No. 85-1626

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., LYMAS L. WINFIELD, and UNITED POLITICAL ACTION COMMITTEE OF CHESTER COUNTY, DAVID DANTZLER, JR., JOHN R. HICKS, III, DOCK L. MEEKS, individually and on behalf of all others similarly situated,

v.

Petitioners,

LUKENS STEEL COMPANY, UNITED STEELWORKERS OF AMERICA (AFL-CIO-CLC), LOCAL 1165, UNITED STEELWORKERS OF AMERICA (AFL-CIO-CLC), and LOCAL 2295, UNITED STEELWORKERS OF AMERICA (AFL-CIO-CLC),

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENTS

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENTS

The Equal Employment Advisory Council respectfully submits this brief as amicus curiae with the consent of the parties. Statements of consent have been submitted to the Clerk of the Court. This brief urges that the deci-

sion of the Third Circuit Court of Appeals on the statute of limitations issues be affirmed, and thus supports the position of the Respondents.

INTEREST OF THE AMICUS

The Equal Employment Advisory Council (EEAC) is a voluntary, nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations which themselves have hundreds of employer members interested in the foregoing purposes. EEAC's governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity (EEO). Their combined experience gives EEAC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements. The members of EEAC are firmly committed to the principles of non-discrimination and equal employment opportunity.

Substantially all of EEAC's members, or their constituents, are subject to 42 U.S.C. Sec. 1981, Title VII of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e, *et seq.*) and other equal employment statutes and regulations. Thus, EEAC's members have a direct interest in the issues presented by this case—i.e., (1) what is the appropriate characterization, for statute of limitations purposes, of claims brought under 42 U.S.C. Sec. 1981? and (2) should the limitations selection rule announced in *Wilson v. Garcia*, 471 U.S. 261 (1985), as applied to Section 1981 claims, be excepted from the presumption of retroactive effect? Many of EEAC's members are

currently engaged in lawsuits involving Section 1981 claims, and the Court's decision in this case could directly affect the outcome of those suits. All of EEAC's members are subject to such lawsuits, and thus may be affected in the future by the Court's decision.

Motivated by its concern for how Section 1981 is interpreted and applied, EEAC has filed amicus curiae briefs in this Court in *Guardians Association v. Civil Service Commission of City of New York*, 463 U.S. 582 (1983) (concerning whether proof of intent to discriminate is necessary to establish a violation of Section 1981 and Title VI); and *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375 (1982) (concerning whether proof of intent to discriminate is necessary to establish a violation of Section 1981). EEAC also has filed amicus curiae briefs in numerous cases concerning statute of limitations issues under Title VII. *See, e.g., Zipes v. TWA*, 455 U.S. 385 (1982) (concerning whether timely filing of a Title VII charge is a jurisdictional prerequisite to maintaining a Title VII suit); *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980) (concerning when a Title VII charge filed with a state agency is considered filed with EEOC); *International Union of Electrical Workers, Local 790 v. Robbins & Meyers*, 429 U.S. 229 (1976) (concerning whether the filing of a grievance under a labor contract tolls Title VII's limitations period for filing an EEOC charge). In addition, EEAC has filed amicus curiae briefs in cases dealing with a broad range of other issues under Title VII and other statutes that affect EEO law. *See, e.g., Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Great American Savings & Loan Association v. Novotny*, 442 U.S. 366 (1979); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

STATEMENT OF THE CASE

Petitioners filed this class action in the United States District Court for the Eastern District of Pennsylvania on June 14, 1973, alleging that Respondents had engaged in various forms of employment discrimination in violation of 42 U.S.C. Sec. 1981 and Title VII of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e *et seq.*). In 1975, the court issued an unpublished opinion certifying the class and holding that the Section 1981 claims should be governed by Pennsylvania's six-year limitations period applicable to various tort and contract claims, rather than the state's two-year period "for injury wrongfully done to the person." (*See* Appendix to Petition for Writ of Certiorari at A-60.) The case proceeded to trial in 1980, and in 1984 the court ruled that some of the alleged violations under both Title VII and Section 1981 had occurred. *See Goodman v. Lukens Steel Co.*, 580 F. Supp. 1114 (E.D. Pa. 1984).

On appeal, the United States Court of Appeals for the Third Circuit affirmed in part, reversed in part, and vacated and remanded in part. *See Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1985). The circuit court reversed the lower court's application of Pennsylvania's six-year limitations period to the Section 1981 claims, holding that this Court's decision in *Wilson v. Garcia*, 471 U.S. 261 (1985), dictates that "the personal injury statute of limitations of the forum state supplies the most analogous statute of limitations for actions brought under § 1981." 777 F.2d at 120. In arriving at that holding, the court noted "the broad sweep of § 1981," *id.* at 119, and emphasized that, like the claims under 42 U.S.C. Sec. 1983 addressed in *Wilson*, Section 1981 claims seek redress for "injury to the individual rights of the person." *Id.* The circuit court further held that "[i]n view of the previous unsettled law in this and other circuits," *Wilson* should be applied retroactively. 777 F.2d at 118, 120. Accordingly, the court ordered

that Pennsylvania's two-year limitations period "for injury wrongfully done to the person" be applied to Petitioners' Section 1981 claims. *Id.* at 120.

This Court granted certiorari. The issues presented are: (1) what is the appropriate characterization, for statute of limitations purposes, of claims brought under Section 1981? and (2) should the limitations selection rule announced in *Wilson v. Garcia*, as applied to Section 1981 claims, be excepted from the presumption of retroactive effect?

SUMMARY OF ARGUMENT

I. In *Runyon v. McCrary*, 427 U.S. 160, 182 (1976), this Court upheld the application of a two-year statute of limitations for actions "for personal injuries" to claims brought under 42 U.S.C. Sec. 1981. In reaching that holding, the Court observed that a claim for "vindication of constitutional rights" is indisputably a claim for damage to the person. *Id.* The Court elaborated on that observation in *Wilson v. Garcia*, 471 U.S. 261 (1985), by ruling that since violations of federally guaranteed rights are "an injury to the individual rights of the person," claims for such violations brought under 42 U.S.C. Sec. 1983 "are best characterized as personal injury actions" for limitations purposes. Since claims brought under Section 1983 and claims brought under Section 1981 are both for redress of violations of the federally guaranteed rights of the person, claims under both statutes should be treated the same for statute of limitations purposes.

In addition to providing redress for violations of the same types of rights, Section 1983 and Section 1981 both have broad remedial purposes. In *Wilson*, 471 U.S. at 277, this Court emphasized that the language of the Fourteenth Amendment reflects the "unifying theme" of the legislation that contained the precursor to Section 1983. The legislative history of Section 1981 shows that

it shares a close historical identity with both the Thirteenth and Fourteenth Amendments. Thus, Section 1981 embodies the same "unifying theme" as Section 1983, and both statutes clearly were enacted with broad remedial purposes in mind. In light of this common purpose, the same statutes of limitations should be applied to both Section 1983 and Section 1981.

The federal interests in uniformity, certainty, and minimization of unnecessary litigation—on which this Court relied in deciding *Wilson*—further support identical treatment of Section 1983 and Section 1981 for limitations purposes. Because claims under the two statutes are essentially alike, and because the same set of circumstances often can give rise to a claim under either statute, uniformity and certainty would be enhanced by equal limitations treatment. In turn, litigation over limitations questions, which this Court characterized in *Wilson* as "unproductive and ever increasing," 471 U.S. at 275, would be reduced.

II. In applying its decision on the limitations question retroactively, the circuit court in the instant case merely followed the time-honored presumption that courts should apply the law in effect at the time they decide a case. Moreover, the three factors set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), for determining retroactive application of changes in statute of limitations law, do not suggest that the circuit court acted improperly.

First, at the time Petitioners filed suit, there was no definitive Third Circuit precedent to indicate the appropriate limitations period for Section 1981 claims. Thus, the circuit court did not overrule a "clear past precedent." In addition, at the time Petitioners filed suit *and long before Wilson*, there was a substantial body of federal case law holding that both Section 1983 and Section 1981 claims should be characterized as personal injury actions for limitations purposes. Combined with the absence of a clear past precedent, this body of law put

Petitioners on notice that the circuit court might decide the limitations selection question contrary to the characterization which Petitioners assumed. The court's decision was reasonably foreseeable at the time Petitioners brought suit.

Second, the policies underlying *Wilson* do not suggest that retroactive application should be avoided. As noted above, the federal interests on which this Court relied in *Wilson* will be forwarded if Section 1983 and Section 1981 are treated the same for limitations purposes.

Finally, the equities do not weigh in Petitioners' favor. As noted above, when Petitioners brought this action, it was reasonably foreseeable that the circuit court would adopt the limitations selection rule it applied to the instant case. However, rather than file within the shorter period for personal injury actions, Petitioners chose to gamble that their reliance on the longer period for breach of contract actions would prove correct. Unfortunately for Petitioners, they lost that gamble.

ARGUMENT

I. THIS COURT'S DECISION IN *WILSON v. GARCIA* REQUIRES THAT CLAIMS BROUGHT UNDER 42 U.S.C. SEC. 1981 AND CLAIMS BROUGHT UNDER 42 U.S.C. SEC. 1983 BE CHARACTERIZED ALIKE FOR STATUTE OF LIMITATIONS PURPOSES, BECAUSE BOTH STATUTES PROVIDE REDRESS FOR VIOLATIONS OF THE FEDERALLY GUARANTEED RIGHTS OF THE PERSON, BOTH STATUTES HAVE BROAD REMEDIAL PURPOSES, AND THE POLICIES RELIED UPON IN *WILSON* FOR CHARACTERIZING SECTION 1983 CLAIMS ARE EQUALLY APPLICABLE TO SECTION 1981 CLAIMS.

This Court held in *Wilson v. Garcia*, 471 U.S. 261 (1985), that, for statute of limitations purposes, "§ 1983 claims are best characterized as personal injury actions . . ." *Id.* at 280. The Court reached that conclusion

based on "the elements of the cause of action, and Congress' purpose in providing it," *id.* at 268, and noted that this characterization "is supported by the nature of the § 1983 remedy. . . ." *Id.* at 276. The Court also observed that, in light of the historical origins of the Civil Rights Act of 1871 (which contained the precursor to Section 1983), "Congress unquestionably would have considered the remedies established in [the 1871 Act] to be more analogous to tort claims for personal injury than, for example, to claims for damages to property or breach of contract." *Id.* at 277. That assessment of the congressional intent underlying Section 1983 was based on "[t]he unifying theme" of the 1871 Act, as "reflected in the language of the Fourteenth Amendment that unequivocally recognizes the equal status of every *'person'* subject to the jurisdiction of any of the several States." *Id.* In light of the close similarity between the cause of action provided by Section 1983 and the cause of action provided by Section 1981, as well as the broad remedial purposes of the two statutes, the limitations selection rule announced in *Wilson* should be applied equally to Section 1981.

A. Both Section 1983 And Section 1981 Provide Redress For Violations Of The Federally Guaranteed Rights Of The Person, And Thus Remedy Injuries To The Person.

In *Runyon v. McCrary*, 427 U.S. 160 (1976), this Court held that it is appropriate to apply a two-year statute of limitations for actions "for personal injuries" to Section 1981 claims. *Id.* at 180-82. That holding was premised primarily on the Court's unwillingness to displace the judgment of the Fourth Circuit on an issue heavily contingent upon the resolution of a state law question. *Id. at* 181. Nevertheless, the Court also observed that whether the Section 1981 claims in *Runyon* (denial of admission to private schools on the basis of race) were characterized as "involving 'injured feelings and humiliation,' . . . *or the vindication of constitutional rights, . . . there is no dispute that the damage was to their persons,* not to their realty or personalty." *Id.* at 182 (emphasis added). Thus, *Runyon* strongly suggested that claims arising from violations of federal rights are essentially claims for injury to the person.

In *Wilson*, this Court cited *Runyon*'s holding on the limitations issue, and elaborated the principle that *Runyon* had suggested, to conclude that Section 1983 claims should be characterized as personal injury actions for statute of limitations purposes. The Court emphasized that Section 1983 provides redress for violations of the constitutional and other federal rights guaranteed to the *person*, and that a violation of those rights "is an injury to the individual rights of the person." 471 U.S. at 277. The Court then quoted the Fourth Circuit's opinion in *Almond v. Kent*, 459 F.2d 200 (4th Cir. 1972), to further support its reliance on the analogy between tort claims for personal injury and claims brought under Section 1983:

> In essence, § 1983 creates a cause of action where there has been injury, under color of state law, to the person or to the constitutional or federal statutory rights which emanate from or are guaranteed to the person. In the broad sense, every cause of action under § 1983 which is well-founded results from "personal injuries."

471 U.S. at 278, *quoting Almond*, 459 F.2d at 204. Thus, *Wilson* made clear that the reason for characterizing Section 1983 claims as tort claims for personal injury is that Section 1983 provides redress for violations of the federally guaranteed rights of the person.

The better reasoned opinions of the lower federal courts, both pre- and post-*Wilson*, have recognized that the same principle applies when characterizing Section 1981 claims for limitations purposes. For example, writing for the United States District Court for the Western District of Pennsylvania, Judge Teitelbaum ruled that:

> *"a deprivation of civil rights is primarily the violation of personal rather than property rights. Marlowe v. Fisher Body*, 489 F.2d 1057, 1063 ([6th Cir.] 1973). This formulation is not altered merely because plaintiff is proceeding under Sec. 1981, a provision specifically protecting contract rights: the statute of limitations attaches to the cause of action, rather than to the form in which the action happens to be brought. *P.L.E. Limitation of Actions* Secs. 21, 32; *Jones v. Boggs & Buhl*, 355 Pa. 242, 245, 311 A.2d 316 (1946).

Davis v. United States Steel Supply, Division of Unitcd States Steel Corp., 405 F. Supp. 394, 396 (W.D. Pa. 1976) (emphasis in original), *rev'd*, 581 F.2d 335 (3d Cir. 1978), *cert. denied*, 460 U.S. 1014 (1983).[1] *See also Gordon v. City of Warren*, 415 F. Supp. 556, 560 (E.D. Mich. 1976) (*quoting Krum v. Sheppard*, 255 F. Supp. 994 (W.D. Mich. 1966), *aff'd*, 407 F.2d 490 (6th Cir. 1967) (" . . . even in a civil rights action where property has been damaged, the basis of the civil rights action is still the violation of personal rights.")), *rev'd on other grounds*, 579 F.2d 386 (6th Cir. 1978).

In addition, the United States Court of Appeals for the Fifth Circuit has ruled that:

> section 1981 [employment discrimination] cases arise independently of any contractual agreement between employee and employer . . . ; instead, they arise from the employer's violation of his duty not to violate the plaintiff's civil rights secured under section 1981. . . . When an employer discriminates on the basis of race in violation of section 1981, he has violated a duty imposed by law . . . .

Page v. U.S. Industries, Inc., 556 F.2d 346, 352 (5th Cir. 1977). *See also Ingram v. Steven Robert Corp.*, 547

[1] Although *Davis* was reversed, *Wilson* establishes that it was reversed improperly. Thus, the reasoning in *Davis* is correct under current law.

F.2d 1260, 1263 (5th Cir. 1977) (Section 1981 employment discrimination claim arises from a statutory duty independent of any agreement between employer and employee). More recently, the United States Court of Appeals for the District of Columbia Circuit ruled in an employment discrimination case that because Section 1981 is a broad protection for the rights of all persons to the full and equal benefit of the laws, a violation of Section 1981 "is a 'personal injury' in very much the same sense as is a violation of § 1983." *Banks v. Chesapeake and Potomac Telephone Co.*, 41 EPD (¶ 36,634) 44,829, 44,834 (D.C. Cir. 1986) (Wright, J.).[2]

[2] Numerous other decisions of the federal courts before *Wilson* characterized Section 1981 claims, like Section 1983 claims, as personal injury claims for limitations purposes. *See, e.g., EEOC v. Gaddis*, 733 F.2d 1373, 1377 (10th Cir. 1984) (interest protected and evil to be remedied are alike under both Sec. 1981 and Sec. 1983, and they should not be differentiated); *Garcia v. University of Kansas*, 702 F.2d 849, 851 (10th Cir. 1983) (applying statute for injury to the rights of another to both Sec. 1981 and Sec. 1983 claims); *Jones v. Orleans Parish School Board*, 679 F.2d 32, 36 (5th Cir.) (applying tort statute to Secs. 1981 and 1983 claims for racial discrimination), *modified on other grounds*, 688 F.2d 342 (5th Cir. 1982), *cert. denied*, 461 U.S. 951 (1983); *Movement for Opportunity & Equality v. General Motors Corp.*, 622 F.2d 1235, 1242-43 (7th Cir. 1980) (Indiana personal injury statute applied to Sec. 1981 claim; court noted "the choice of a statute of limitations under section 1981 . . . is essentially the choice to be made under 42 U.S.C. § 1983 . . ."); *Owens v. Weingarten's, Inc.*, 442 F. Supp. 497, 498 (W.D. La 1977); *Bulls v Holmes*, 403 F. Supp. 475, 478 (E.D. Va. 1975); *Weldon v. Board of Education of School District of City of Detroit*, 403 F. Supp. 436, 438 (E.D. Mich. 1975). *See also Patterson v. American Tobacco Co.*, 535 F.2d 257, 269 n.10 (4th Cir. 1976) (". . . a statutory action attacking racial discrimination is fundamentally for the redress of a tort.")

Since *Wilson*, several courts have adopted the position of the Third Circuit in the instant case. *See, e.g., Friedlander v. Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500, 1503 n.2 (11th Cir. 1986); *Anderson v. University Health Center*, 623 F. Supp. 795, 796 (W.D. Pa. 1985) ("no reason why the same rule [for Sec. 1983 claims] should not apply to Section 1981 actions.");

The principle that claims under Section 1983 and Section 1981 must be characterized based on the remedy those statutes provide relies on the substantive content of the cause of action rather than mere similarities in language between particular provisions of the Civil Rights Statutes and particular state statutes of limitations. *See Shorters v. City of Chicago*, 617 F. Supp. 661, 664 (N.D. Ill. 1985) ("the test must be a commonality of *substantive content* and not mere similarity of *language*") (emphasis in original). Under that approach, it is not controlling for limitations purposes that Section 1981 refers, among other rights, to the equal rights of all persons in the United States "to make and enforce contracts." Rather, the salient consideration is that Section 1981 guarantees each individual a federal right to equal treatment in contractual (and other) affairs. A violation of that guarantee is an injury to the individual rights of the person, and thus must be characterized as an injury to the person. *Wilson*, 471 U.S. at 277.

B. Both The Language And The Legislative History Of Section 1981 Show That It Has The Same Broad Remedial Purposes As Section 1983.

Section 1981 provides that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, *to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property* as is enjoyed by white citizens, *and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.*

42 U.S.C. Sec. 1981 (emphasis added). However high the concentration of cases brought under this statute

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Saldivar v. Cadena, 622 F. Supp. 949, 958 (W.D. Wis. 1985) (applying statute applicable to actions for injuries to the character or "rights of another" to Sec. 1981 claims); *Taylor v. Bunge Corp.*, 39 FEP Cases 265 (5th Cir. 1985).

may be in the area of employment discrimination, *see* Brief for Petitioners at 18-19, it is clear that on its face Section 1981 provides redress for violations of a broad range of federal rights. "[A] natural and commonsense reading of the statute compels the conclusion that section 1981 has broad applicability beyond the mere right to contract," and any reading that limits its applicability to only contractual or economic matters "ignores the clear and vital words of the majority of its provisions." *Mahone v. Waddle*, 564 F.2d 1018, 1028 (3d Cir. 1977). *See also Saldivar v. Cadena*, 622 F. Supp. 949 (W.D. Wis. 1985) (ruling that Section 1981 is not limited to employment discrimination claims, and citing cases in which Section 1981 was invoked for redress of racial discrimination by a swimming pool association, wrongful death of a prisoner in police custody, and interference by the Ku Klux Klan with the contract rights of a Vietnamese fisherman).[3]

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[3] Both Petitioners (Brief for Petitioners at 12) and their supporting Amici, Lawyers Committee for Civil Rights, *et al.* (Brief for Amici in Support of Petitioners at 6), make much of this Court's statement in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975), that Section 1981 "relates primarily to racial discrimination in the making and enforcement of contracts." That statement can be read in context as nothing more than dicta, a passing remark in the course of an opinion which recognized that, in the area of employment discrimination, Section 1981 is a broad remedial statute which stands apart from Title VII for limitations tolling purposes. In light of Section 1981's clear language, the Court's statement in *Johnson* can hardly be read as a restriction on the numerous types of claims that Section 1981 provides. Moreover, this Court has subsequently referred to Section 1981 in much broader terms as guaranteeing "the right to be free from racial discrimination in specific activities, such as making contracts and bringing suit." *Burnett v. Grattan*, 468 U.S. 42, 44 n. 2 (1984).

Likewise, Petitioners' reliance, Brief for Petitioners at 12, on this Court's observation in *Georgia v. Rachel*, 384 U.S. 780, 791 (1966), that Section 1981 confers "a limited category of rights, specifically defined in terms of racial equality," is misplaced. Read

Beyond its clear language, the legislative history of Section 1981 reveals that the statute shares with Section 1983 a common purpose of broadly redressing violations of the federally guaranteed rights of the person. To understand this common purpose, it is necessary first to recall what this Court said in *Wilson* when it adopted the analogy between tort claims for personal injury and Section 1983 claims:

> The unifying theme of the Civil Rights Act of 1871 [which contained the precursor to Section 1983] is reflected in the language of the Fourteenth Amendment that unequivocally recognizes the equal status of every "*person*" subject to the jurisdiction of any of the several States. The Constitution's command is that all "*persons*" shall be accorded the full privileges of citizenship; no *person* shall be deprived of life, liberty, or property without due process of law or be denied the equal protection of the laws. A violation of that command is an injury to the individual rights of the person.

471 U.S. at 277 (emphasis in original). *Wilson* made clear that the purpose and scope of Section 1983 are commensurate with the Fourteenth Amendment's broad equal protection guarantees. Section 1981's close historical identity with the Fourteenth Amendment shows that it shares Section 1983's broad remedial purposes.

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in context, that statement does not in any way restrict the types of claims that the broad terms of Section 1981 permit. Rather, the Court was merely observing in *Rachel* that the rights protected by Section 1981 are racial in character.

Even if the Court does view Section 1981 as primarily concerned with contractual affairs, it is still the cause of action for infringement of the federally guaranteed personal right to be free from discrimination in those affairs that is crucial in characterizing Section 1981 for limitation purposes. *See* Part I.A. of this Brief, *supra*.

Section 1981 is derived from both Sec. 1 of the Civil Rights Act of 1866, 14 Stat. 27,[4] and Section 16 of the Enforcement Act of 1870, 16 Stat. 140. *Runyon*, 427 U.S. at 169 n. 8. Section 1 of the 1866 Act was enacted pursuant to the enabling clause of the Thirteenth Amendment.[5] This Court has noted on numerous occasions that "[t]he operative language of . . . § 1981 . . . is traceable to the Act of April 9, 1866." *Tillman v. Wheaton-Haven Recreation Association, Inc.*, 410 U.S. 431, 439 (1973); *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 384 (1982); *Runyon*, 427 U.S. at 171.

Shortly after enactment of the 1866 Act, concerns developed that the statute might be repealed by a subsequent Congress and that its application to the states might be contrary to the Constitution. A joint resolution passed by Congress to allay those concerns eventu-

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[4] Section 1 of the 1866 Act provided in pertinent part:

> That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

[5] The Thirteenth Amendment provides:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

ally became the Fourteenth Amendment.[6] *United States v. Wong Kim Ark*, 169 U.S. 649, 675 (1898); *Hurd v. Hodge*, 334 U.S. 24, 32-33 (1948). Thus, it is well recognized that a major impetus behind the enactment of the Fourteenth Amendment was Congress' desire to incorporate into the Constitution the provisions of the 1866 Act so as to prevent a future Congress from repealing it and to remove any doubt about its constitutionality. *Hurd*, 334 U.S. at 32-33. *See also* R. Berger, *Government By Judiciary, The Transformation of the Fourteenth Amendment* 23 (1977); H. Graham, *Everyman's Constitution* 291 (1968). Indeed, this Court has stated that the 1866 Act and the Fourteenth Amendment were "expressions of the same general congressional policy." *Hurd*, 334 U.S. at 32.

After the Fourteenth Amendment had been passed, and pursuant to the power granted by Section 5 of the Amendment, Congress reenacted the 1866 Act as part of the Enforcement Act of 1870. *General Building Contractors*, 458 U.S. at 385-86; *Tillman*, 410 U.S. at 439-40 n. 11. Section 18 of the 1870 Act simply reenacted the 1866 Act in its entirety.[7] Section 16 of the 1870 Act,

[6] The Fourteenth Amendment provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . .
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

[7] Section 18 of the Enforcement Act of 1870 provided in pertinent part:

> That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted.

with minor modifications, carried forward the language of Section 1 of the 1866 Act.[8] The scope of the 1866 Act, however, was not altered by the modification in the 1870 re-enactment. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1986). Indeed, the wording changes that appeared in the 1870 Act probably were only to reflect the language of the Fourteenth Amendment. *See General Building Contractors*, 458 U.S. at 386; *Tillman*, 410 U.S. at 439-40 n. 11.

This Court implicitly reaffirmed the direct linkage of the 1866 and 1870 enactments to the Fourteenth Amendment following the 1874 codification of Section 16 of the 1870 Act into Sec. 1977 of the Revised Statutes.[9] *See*

[8] Section 16 provided:

> That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void.

Section 16 applied to "all persons," whereas Section 1 of the 1866 Act applied merely to "all citizens." Section 16 also added the language concerning "taxes, licenses and exactions of every kind."

[9] R.S. Sec. 1977 provided that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and

United States v. Wong Kim Ark, 169 U.S. at 695; *Tillman*, 410 U.S. at 439-40 n. 11. In *Strauder v. West Virginia*, 100 U.S. 303, 312 (1879), the Court noted that Sec. 1977 put "in the form of a statute what had been substantially ordained by the [Fourteenth] [A]mendment. It was a step towards enforcing the constitutional provisions." Similarly, in *Buchanan v. Warely*, 245 U.S. 60, 79 (1917), the Court described Sec. 1977 as a statute "enacted in furtherance of the [Fourteenth Amendment's] purpose." Revised Statutes Sec. 1977 now appears as 42 U.S.C. Sec. 1981.

The preceding discussion makes clear that, while the original precursor to Section 1981 was enacted pursuant to the Thirteenth Amendment, the current version of Section 1981 is equally founded on the Fourteenth Amendment. In *Wilson*, this Court emphasized that the language of the Fourteenth Amendment reflects the "unifying theme" of the Civil Rights Act of 1871 (the precursor to Section 1983). 471 U.S. at 277. Since Section 1981 is directly tied by its historical origins to the Fourteenth Amendment, it embodies the same "unifying theme" as Section 1983. Clearly, both Section 1981 and Section 1983 "were enacted 'to ensure that individuals whose federal Constitutional or statutory rights are abridged [could] recover damages or secure injunctive relief.'" *Banks*, 41 EPD (¶ 36,634) at 44,833-34, *quoting Burnett*, 468 U.S. at 55.

Moreover, based on its Thirteenth Amendment origins alone, Section 1981 must be seen as a broad remedial statute aimed at protecting the federally guaranteed rights of the person. As the Third Circuit has recognized, the Civil Rights Act of 1866, from which Section 1981 is derived, "was a complete statutory analog to the [T]hir-

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shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

This is the precise language now codified as Section 1981.

teenth [A]mendment . . . not intended to have merely limited effect; rather, it was to eradicate *all* discrimination against blacks and to secure for them full freedom and equality in civil rights." *Mahone*, 564 F.2d at 1028 (emphasis in original). Consequently, in whatever way the legislative history of Section 1981 is read, that statute and Section 1983 have the same broad remedial purposes, and should be characterized the same for statute of limitations purposes.

C. The Policies On Which This Court Relied In *Wilson* Demand That Section 1981 Claims Be Given The Same Characterization, For Statute Of Limitations Purposes, As Section 1983 Claims.

Before deciding the characterization question in *Wilson*, the Court made the initial determination that 42 U.S.C. Sec. 1988 [10] is a directive to select, in each state, the statute of limitations most appropriate for all Section 1983 claims. Such an approach, the Court concluded, is supported by "[t]he federal interests in uniformity, certainty, and the minimization of unnecessary litigation." *Wilson*, 471 U.S. at 275. Those same interests suggest

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[10] 42 U.S.C. Sec. 1988 provides, in relevant part:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . ."

Section 1988 applies equally to Section 1981 and Section 1983.

that Section 1981 and Section 1983 claims should be characterized alike for limitations purposes.

Similar treatment of claims under both statutes would foster the goal of uniformity by applying the same limitations rules to claims that are essentially alike. It would foster the goal of certainty because both plaintiffs and defendants in Section 1981 and Section 1983 actions would know the limitations periods applicable to claims under the two statutes. This is especially important since claims arising from the same set of circumstances often can be brought under either statute. *See Mahone*, 564 F.2d at 1027-31 (discussing the considerable overlap in the coverage of Section 1981 and Section 1983). As for minimizing unnecessary litigation, a clear limitations rule for all actions under the two statutes would reduce the "uncertainty, and unproductive and ever increasing litigation," *Wilson*, 471 U.S. at 275, that limitations questions have created.

II. THE CIRCUIT COURT'S RETROACTIVE APPLICATION OF THE LIMITATIONS SELECTION RULE ANNOUNCED IN *WILSON* TO SECTION 1981 CLAIMS WAS PROPER, BECAUSE THERE WAS NO CLEAR THIRD CIRCUIT PRECEDENT FAVORING THE SIX-YEAR LIMITATION PERIOD ON WHICH PETITIONERS RELIED, AND BECAUSE THE CIRCUIT COURT'S DECISION WAS REASONABLY FORESEEABLE.

The general presumption that federal courts should apply the law in effect at the time they decide a case is a time-honored principle. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n. 15 (1981); *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801); *Mineo v. Port Authority of New York & New Jersey*, 779 F.2d 939, 943 (3d Cir. 1985), *cert. denied*, 106 S.Ct. 3297 (1986). In applying the limitations selection rule announced in *Wilson* to claims brought under Section 1981, the Third Circuit merely followed that maxim in

the instant case. Moreover, the circuit court adopted the same position on the retroactive effect of *Wilson* adopted by nearly every circuit court that has considered the question. *See DeNardo v. Murphy*, 781 F.2d 1345, 1347 n. 2 (9th Cir. 1986), *cert. denied*, 106 S.Ct. 1962 (1986).[11]

This Court addressed the retroactive application of changes in statute of limitations law in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The Court adopted a three-part analysis:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied ret-

[11] *See also* the following cases, cited by *DeNardo*: *Mulligan v. Hazard*, 777 F.2d 340, 343-44 (6th Cir. 1985), *cert. denied*, 106 S.Ct. 2902 (1986); *Rivera v. Green*, 775 F.2d 1381, 1383-84 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 1656 (1986); *Wycoff v. Menke*, 773 F.2d 983, 986-87 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 1230 (1986); *Gates v. Spinks*, 771 F.2d 916, 917-19 (5th Cir. 1985) (applying *Wilson* retroactively without discussing retroactivity), *cert. denied*, 106 S.Ct. 1378 (1986); *Fitzgerald v. Larson*, 769 F.2d 160, 162-64 (3d Cir. 1985), *vacated and remanded for reconsideration in light of Wilson*, 471 U.S. 1051 (1985); *Smith v. City of Pittsburgh*, 764 F.2d 188, 194-95 (3d Cir.), *cert. denied*, 106 S.Ct. 349 (1985); *Jones v. Preuit & Mauldin*, 763 F.2d 1250, 1253 n. 2 (11th Cir. 1985) (parties did not argue that *Wilson* should be applied only prospectively), *cert. denied*, 106 S.Ct. 893 (1986). *But see Jackson v. Bloomfield*, 731 F.2d 652, 653-55 (10th Cir. 1984) (*en banc*) (decided same day as *Garcia v. Wilson*, 731 F.2d 640 (10th Cir. 1984), *aff'd*, 471 U.S. 461 (1985), and declining to apply *Garcia* retroactively).

roactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Id. at 106-07 (citations omitted). Application of that analysis to the instant case makes clear that the circuit court properly gave its decision the presumptively proper retroactive effect.

The first *Chevron* factor is also the most fundamental. *See Wachovia Bank & Trust v. National Student Marketing*, 650 F.2d 342, 347 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981). In applying that factor, one of two questions must be answered affirmatively to avoid retroactive application: (1) did the decision to be applied retroactively establish a new principle of law by overruling a *clear past precedent?* or (2) did the decision to be applied retroactively decide a new principle of law by deciding an issue of first impression whose resolution was *not clearly foreshadowed?* Both of these questions must be answered by comparing the new decision "to the law at the time the plaintiff relied upon it, that is, the law after the claim arose and during the running of the limitations period." *Id.* This comparison is required by *Chevron* itself, since that decision requires nonretroactive application only of decisions overruling law "on which litigants may have relied," and since the Court focused in *Chevron* on the law that the plaintiff had relied upon when contemplating suit. *Id. See also Small v. Inhabitants of City of Belfast*, 617 F. Supp. 1567, 1574 (D. Me. 1985) (court must examine the status of the law prior to *Wilson*, particularly prior to the time plaintiffs filed suit), *reversed on other grounds*, 796 F.2d 544 (1st Cir. 1986).

It is clear that the circuit court's reliance on the *Wilson* principles in the instant case to apply the personal injury statute of limitations to Section 1981 claims did not overrule a clear past precedent. As the Third Circuit has observed of its own precedent, when petitioners initiated

the instant action in 1973, "there was no established precedent in the Third Circuit to indicate the appropriate limitations period for Section 1981 claims." *Al-Khazraji v. Saint Francis College*, 784 F.2d 505, 512 (3d Cir. 1986), *appeal pending*. Not until 1977, in *Meyers v. Pennypack Woods Home Ownership Association*, 559 F.2d 894 (3d Cir. 1977), did the Third Circuit clearly apply Pennsylvania's six-year statute of limitations to a Section 1981 action. *See Al-Khazraji*, 784 F.2d at 512. Even as late as 1978, in *Davis v. United States Steel Supply, Division of United States Steel Corp.*, 581 F.2d 335, 341 n. 8 (3rd Cir. 1978), the Third Circuit stated that: "for statute of limitations purposes, each complaint and different aspects of the same complaint may be treated differently. We hold only that [the six-year limitation period] applies to actions where the gist of a § 1981 complaint concerns racially discriminatory discharge of an employee *under the facts in this record.*" (Emphasis added.)[12]

Clearly, from the time Petitioners' claim arose until they filed suit in 1973, there was no definitive Third Circuit holding on how Section 1981 claims should be characterized for statute of limitations purposes. Thus, the court's application of *Wilson* to Section 1981 claims in the instant case did not overrule a clear past precedent in the sense required by *Chevron* to avoid retroactivity. Moreover, there was a substantial body of federal case law pre-dating both *Wilson and the date on which Petitioners filed this action* which characterized both Section 1983 and Section 1981 claims as personal injury claims for limitations purposes. *See Gordon v. City of Warren*,

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[12] The confusion in Third Circuit law at the time Petitioners filed their action is in sharp contrast with the state of the law when the plaintiff in *Al-Khazraji* filed his action in 1980. By that time, "the precedents were sufficiently clear that *Al-Khazraji* could reasonably have relied upon them when deciding to delay filing his Section 1981 claim." *Al-Khazraji*, 784 F.2d at 513.

415 F. Supp. at 559-61 (citing such cases from as early as 1966). That case law put Petitioners on notice that they could not reasonably rely only on the longer six-year period. *See Wycoff*, 773 F.2d at 986 (no overruling of clear past precedent where, at time suit was filed, law in circuit was in disarray and several cases applied shorter limitations period); *Smith*, 764 F.2d at 195 (absence of a definitive holding choosing a longer limitation and substantial support in other opinions for a shorter period put plaintiff on notice it was not reasonable to wait beyond the shorter period).

Likewise, the circuit court did not decide an issue of first impression whose resolution was not clearly foreshadowed. That is, both the circuit court's decision to adopt a single characterization of all Section 1981 claims for limitations purposes, and the characterization rule it adopted, were reasonably foreseeable at the time Petitioners filed suit. First, the fact that, *at the time Petitioners filed suit*, the Third Circuit's decisions did not provide a clear rule on the appropriate limitations period for Section 1981 claims, made it reasonably foreseeable that the court would decide the question at any time. Second, the fact that, *at the time Petitioners filed suit*, there were cases from other federal courts which conflicted with the characterization relied upon by Petitioners, *see Gordon*, *supra*, made a decision in accordance with the principles set forth in *Wilson* "reasonably foreseeable." *See United States v. Rodgers*, 466 U.S. 475, 484 (1984) (even if a litigant could establish reliance on a longstanding circuit court case, the Court would apply its decision retroactively "since the existence of conflicting cases from other courts of appeals made review of that issue by [the Supreme Court] and decision against the position of [the litigant] reasonably foreseeable.) Because both of the questions posited by the first *Chevron* factor must be answered in the negative, the circuit court in the instant case did not "establish a new

principle of law" in the sense required by *Chevron* to justify nonretroactivity.

The second *Chevron* factor examines the prior history of the rule in question, its purpose and effect, and whether its operation will be furthered or retarded by its retroactive operation. For the reasons discussed in part I.C. of this Brief, *supra*, the federal interests underlying *Wilson* (uniformity, certainty, and avoidance of unnecessary litigation) will be forwarded by applying the *Wilson* principles for limitations selection to Section 1981 claims. The checkered and wavering approach which characterizes the prior history of characterization of Section 1981 claims for limitations purposes does not demand otherwise.

Finally, in light of the fact that, at the time Petitioners filed suit, there was no clear precedent and it was reasonably foreseeable that the Third Circuit would decide to characterize all Section 1981 claims as personal injury claims for limitations purposes, the equities do not weigh in Petitioners favor. Rather than file within the shorter period for personal injury actions, Petitioners gambled that the court would characterize Section 1981 claims as claims for breach of contract, thus making such claims subject to a six-year limitations period. Unfortunately for Petitioners, they lost their gamble.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the decision of the Third Circuit on the statute of limitations issues should be affirmed.

Respectfully submitted,

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